No. 77-1420

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHICAGO HEALTH CLUBS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 567 F. 2d 331. The decision and order of the National Labor Relations Board (Pet. App. A17-A29) are reported at 226 NLRB 1202. The Decision and Direction of Election of the Regional Director (Pet. App. A30-A40) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1977. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 6, 1978 (Pet. App. A54). The petition for a writ of certiorari was filed on April 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably exercised its discretion to determine appropriate collective bargaining units by establishing a unit consisting of the employees at the Company's Schaumburg, Illinois, facility, rather than a unit composed of the employees at all of its sixteen health clubs in the Chicago area.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at page A55 of the appendix to the petition.

STATEMENT

1. Petitioner ("the Company") operates 16 health clubs within a 28-mile radius of its central office in downtown Chicago (Pet. App. A31 n. 4). The Retail Clerks Union, Local 1540 ("the Union") petitioned the Board for a representation election among the

employees at the Schaumburg, Illinois, club. The Company opposed the petition, urging that the proper unit encompassed all 16 clubs (*ibid.*).

After an evidentiary hearing on the petition, the Board's Regional Director found that the Schaumburg club manager exercises extensive control over those aspects of the operation that directly affect the day-to-day working conditions of the employees, possessing the authority to hire, fire, reprimand, initiate pay raises, and schedule working hours (Pet. App. A35-A36 n. 4). He further found that those aspects of the business which are centralized are primarily billing, payroll, and other record-keeping; customer sales matters; and equipment purchase and maintenance (Pet. App. A32 n. 4).

In addition, the Regional Director found that there were few permanent transfers of non-supervisory personnel from other clubs to the Schaumburg club (Pet. App. A33-A34 n. 4). The temporary transfers of non-supervisory personnel were related to two promotional events or involved sales trainees, a classification with high turnover (*ibid.*).[1] The Regional Di-

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[1] The Regional Director stated (Pet. App. A34 n. 4):

> Eliminating the interchange which occurred at the grand opening promotion on November 15-17, 1974, and that which occurred at the Bobby Riggs promotion on March 22-23, 1975, and without considering the interchange of managers and assistant managers, since the Schaumburg club opened for operation, 10 unit employees, all sales trainees, were temporarily transferred to the Schaumburg location for a total of 28 days, generally

rector also found that the Schaumberg club is at least several miles distant from the others and tends to serve its own geographical area (Pet. App. A37 n. 4).

The Regional Director concluded that the Schaumburg, Illinois, club was an appropriate unit for collective bargaining. He explained (Pet. App. A36-A37 n. 4):

> Whether or not a proposed unit confined to one of two or more retail establishments making up an employer's retail chain or division thereof is appropriate is to be determined in the light of all the circumstances of the case. *Sav-On Drugs*, 138 NLRB 1032. The general rule is that a single store in a retail chain is presumptively an appropriate unit for bargaining unless certain factors are present which establish that the single store has effectively been merged into a more comprehensive unit, thus losing its individual identity. *Sav-On Drugs, supra; Haag Drug Company, Incorporated*, 169 NLRB 877 * * *.
>
> * * * [S]uch factors as centralized bookkeeping, payroll records, purchasing, merchandising and advertising are of little or no significance in

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1 day at a time, and 10 employees, all sales trainees, were permanently transferred to the Schaumburg location for periods ranging from 1 month to as long as from January 1975 to the present time. There is no indication that other than during the promotions, any instructors, instructresses or any of the other unit employees were transferred to or from the Schaumburg facility. There are approximately 36 employees at the Schaumburg club, excluding managers and assistant managers who, at the time of the hearing, numbered five.

> determining an issue such as that which exists herein. These functions are administrative or record keeping and do not directly affect the employees' day-to-day work performance or concern the daily matters which give significance to the community of interest of employees in the individual facility. Therefore, the authority of the club manager to handle such matters as hiring and firing, grievances and routine daily problems must be examined as one of the factors critical to the instant issues. It appears that for a substantial majority of the time, the club manager is the highest level of management present at the club and is in charge of the club's day-to-day operations. The club manager, and at times, the assistant managers, exercise a marked degree of control over hiring, hours, discipline and initial rates of pay, at least for instructors and instructresses. Furthermore, the facility is geographically separated from the other clubs, and essentially serves its own geographic area * * *, and there is only a small amount of permanent and temporary interchange in the normal operations of the club * * *. It appears that the evidence herein, taken as a whole, does not rebut the presumption of the appropriateness of a single club unit. * * *

The Board denied the Company's request for review of the Regional Director's unit determination, and the ensuing representation election was won by the Union, which was then certified by the Board as the unit employees' collective bargaining agent (Pet. App. A19). When the Company refused to bargain

with the Union, the Board, on summary judgment, found its refusal violative of Section 8(a)(5) and (1) of the Act and ordered the Company, *inter alia*, to bargain with the Union (Pet. App. A22-A23).

2. The court of appeals enforced the Board's order, concluding that "substantial evidence supports the Board's finding that a single club is an appropriate bargaining unit" (Pet. App. A14). The court added that "[b]ased on the autonomy of the club manager, the insubstantial amount of employee interchange among the metropolitan clubs, and the absence of any collective bargaining history, we conclude that the Board's determination that a single [club] was an appropriate bargaining unit is reasonable in light of all the facts presented in this case" (Pet. App. A16).

The court particularly noted that, "unlike the store managers in *Saxon Paint*, the club managers exercise a marked degree of control over personnel and labor relations matters" (Pet. App. A15).[2] Moreover, in

[2] The court joined the instant case with *National Labor Relations Board* v. *Saxon Paint & Home Care Centers, Inc.*, No. 77-1504, a retail chain store case in which the Board had found a single store unit appropriate. In *Saxon Paint*, the court found, contrary to the Board, that the stores were highly integrated in their operations and that control of personnel and labor relations policies was centrally administered (Pet. App. A8). The court in particular noted that the Saxon Paint store managers had no authority to hire, grant raises, discipline, handle grievances, grant requests for vacations, transfer employees or post a work schedule without approval (Pet. App. A9). The court therefore concluded that a single Saxon Paint store is an inappropriate unit, and declined to enforce the Board's order (*id.* at A13). No issue relating to *Saxon Paint* is involved here.

addition to having control over hiring, firing, and other disciplinary matters (*ibid.*):

> The club manager exercises control over the working conditions of employees in many other respects. For example, the club manager handles employee complaints and grievances about wages and hours, schedules vacations, grants or denies overtime, decides whether employees may take their lunch break on or off the premises, administers the local payroll system, and trains employees in exercise instruction and sales. Thus, unlike *Saxon Paint* and like *Walgreen*,[3] much of the day-to-day employment activities are supervised directly by the local club manager "without significant interference" by the central corporate organization.

ARGUMENT

The Company contends that, in determining appropriate units in retail chain stores, the Board and the Seventh Circuit employ a "presumption test" (Pet. 4) that differs from the " 'balancing of interests' test" employed by other Circuits (Pet. 5) and which amounts to an "absolute rule" approving single store units "allow[ing] the Board to avoid explaining the bases for its decisions * * *" (Pet. 7). We disagree.

[3] *Walgreen Company* v. *National Labor Relations Board*, 564 F. 2d 751 (C.A. 7).

1. While the Act does not lay down specific standards for making unit determinations, over the years the Board has developed a number of criteria, including the criterion that a single plant unit is "presumptively appropriate." *Haag Drug Co., Inc.*, 169 NLRB 877, 878. Initially, the Board did not apply this presumption to retail chain operations,[4] but in 1962 the Board announced that it would "apply to retail chain operations the same unit policy which we apply to multiplant enterprises in general." *Sav-On Drugs, Inc.*, 138 NLRB 1032, 1033.

In 1968, in *Haag Drug*, *supra*, the Board further explicated this policy. It emphasized that the presumption was "not a conclusive one and may be overcome where factors are present in a particular case which would counter the appropriateness of a single-store unit." 169 NLRB at 878. And, in determining whether employees of a single location may constitute an appropriate unit, the Board observed that it would look particularly to "whether or not the employees perform their day-to-day work under the immediate supervision of a local * * * manager who is involved

[4] Between 1951 and 1962, giving controlling weight to the administrative structure of retail chain operations, the Board applied a strong presumption against single-location units. Thus, the Board declared that "absent unusual circumstances, the appropriate collective bargaining unit in the retail * * * trade should embrace all employees within the categories sought who perform their work within the Employer's administrative division or area." *Safeway Stores, Inc.*, 96 NLRB 998, 1000.

in rating employee performance, or in performing a significant portion of the hiring and firing of the employees, and is personally involved with the daily matters which make up their grievances and routine problems" (*ibid.*).[5] However, the Board made clear that it would also look, *inter alia*, to whether the single location "lacks meaningful identity as a self-contained economic unit, or the actual day-to-day supervision is done solely by central office officials, or * * * there is substantial employee interchange" with other locations (*id.* at 879).

Thus, the "presumption" involved here requires the Board in the case of a retail chain operation to weigh the various factors which determine appropriateness of a unit (see Pet. App. A5-A6), just as it does in other industries. And, as shown in the Statement (*supra*, pp. 3-7), both the Board and the court of appeals weighed such factors as the degree of centralized managerial control, the extent of employee interchange, the integration of the various clubs' operations, the geographic proximity of the clubs,

[5] While recognizing that retail chain operations often are marked by a high degree of centralized administration, the Board noted that such recordkeeping and administrative functions "have little or no direct relation to the employees' day-to-day work and employee interests in the conditions of their employment." 169 NLRB at 878. Moreover, drawing a distinction because of this factor "would artificially disadvantage the organizational interests of chain store employees, simply because their employer operates a chain rather than a single-store enterprise * * *" (*ibid.*).

and the prior bargaining history in deciding that the single club unit was appropriate in this case.

Petitioner's contention that the Seventh Circuit applies an "absolute rule" is further belied by its decision here. Although it upheld the Board's unit determination after weighing all of the relevant factors in the instant case, it set aside the Board's unit determination in the companion case, *Saxon Paint* (*supra*, n. 2), after weighing the same factors there.

2. The First, Second, Fifth and Sixth Circuits apply no different test, as an examination of the cases cited by the Company demonstrates.

Thus, the First Circuit in *National Labor Relations Board* v. *Purity Food Stores, Inc.*, 376 F. 2d 497, 501 (Pet. 4-5), like the court below in *Saxon Paint*, *supra*, held that the single store unit presumption did not overcome such factors as personnel practices and procedures (hiring and training) which were centralized and integrated (*id.* at 499) and a high degree of employee interchange (*id.* at 500). However, that Circuit has upheld single store units where, as here, there is little employee interchange and the store manager has authority over day-to-day working conditions. *Banco Credito* v. *National Labor Relations Board*, 390 F. 2d 110, 112 (C.A. 1).

Similarly, in *Continental Insurance Company* v. *National Labor Relations Board*, 409 F. 2d 727, 729 (C.A. 2) (Pet. 5), the Second Circuit upheld the Board's single office unit determination, balancing

the same factors the court weighed here and distinguishing on their facts cases, such as *National Labor Relations Board* v. *Solis Theatre Corp.*, 403 F.2d 381 (C.A. 2) (Pet. 5), where the Board's unit determination had been rejected.

In *National Labor Relations Board* v. *Davis Cafeteria, Inc.*, 396 F. 2d 18, 20-21 (Pet. 5), the Fifth Circuit rejected the Board's unit determination because the record showed that "labor policy is centrally determined, and * * * local managers do not have authority to decide questions which would be subjects of collective bargaining * * *." However, in *Groendyke Transport, Inc.* v. *National Labor Relations Board*, 438 F.2d 981, 982, that Circuit upheld a Board determination that a single unit was appropriate, rejecting the contention petitioner makes here, that the single store unit "sanction[s] piecemeal unionism." Similarly, in *Michigan Hospital Service Corp.* v. *National Labor Relations Board*, 472 F.2d 293, 296, the Sixth Circuit, quoting *National Labor Relations Board* v. *Western and Southern Life Insurance Co.*, 391 F.2d 119, 123 (C.A. 3), upheld a single office unit determination where the office manager possessed considerable autonomy over personnel matters, commenting that, while "[t]he Board may certainly consider the interests of an integrated multi-unit employer in maintaining enterprise-wide labor relations," it was entitled to give the interest of the employees in freely choosing a bargaining representative " 'greater weight than that accorded to the

employer in bargaining with the largest, and presumably most convenient possible unit.' " [6]

3. In sum, the only issue actually presented here is whether the record supports the Board's determination that a single club unit was appropriate in the circumstances of this case. That essentially factual issue does not warrant review by this Court. In any event, for the reasons set forth above (pp. 3-7), the Board's determination is reasonable and fully supported by the evidence.

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[6] In *National Labor Relations Board* v. *Pinkerton's, Inc.*, 428 F.2d 479 (C.A. 6) (Pet. 5), the court denied enforcement of the Board's order because it found matters subject to collective bargaining to be centrally determined. Similarly, in *Wayne Oakland Bank* v. *National Labor Relations Board*, 462 F.2d 666, 668-669 (C.A. 6) (Pet. 5), the court found that the record did not support the Board's "finding that any branch manager has substantial responsibility in relation to the substantive matters subject to collective bargaining."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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